FILED
JAN 27 2003

No. 02-974

IN THE

Supreme Court of the United States

SALLY DOE, as Next Friend of JANE DOE, a Minor,

Petitioners,

v.

ROSEVILLE COMMUNITY SCHOOLS, JOHN LOMNICKI, FRANK C. MAYER, BETTY SLINDE, LEROY HERRON, in their individual and official capacities, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

TIMOTHY J. MULLINS
DANIEL J. KELLY*
TIMOTHY R. NOONAN
COX, HODGMAN & GIARMARCO, P.C.
Attorneys for Respondents
101 West Big Beaver Road
Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

* *Counsel of Record*

178679

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

I. Does the Sixth Circuit Court of Appeals have jurisdiction to review an order from a district court denying a defendant's motion for summary judgment based upon the qualified immunity defense?

II. Did the Sixth Circuit Court of Appeals properly determine that the individual defendants in this case were entitled to qualified immunity?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Granting the Petition	5
I. Respondents Elizabeth Slinde, Leroy Herron, and Frank Mayer Did Not Violate Petitioner Doe's Constitutional Rights	9
A. Elizabeth Slinde	10
B. Leroy Herron	11
C. Frank Mayer	13
II. Respondents Sue Silavs And John Kment Are Entitled To Qualified Immunity	17
A. John Kment	17
B. Dorothea Sue Silavs	19
Conclusion	24

TABLE OF CITED AUTHORITIES

Page

Cases:

Behrens v. Pelletier, 516 U.S. 299, 133 L. Ed. 2d 733, 166 S. Ct. 834 (1996) 6, 7

Blair v. Meade, 76 F. 3d 97 (6th Cir. 1996) 5

Doe v. Clairborne Co., Tenn., 103 F. 3d 495 (6th Cir. 1996) 16

Hoard v. Sizemore, 198 F.3d 205 (6th Cir. 1999) 5, 7

Jane Doe A v. Special School District of St. Louis Co., 901 F. 2d 642 (8th Cir. 1990) 17, 21, 22, 23

Johnson v. Jones, 515 U.S. 304 (1995) 6, 7, 8

Mitchell v. Forsyth, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) 5

Statute:

42 U.S.C. § 1983 3

Rules:

Sixth Circuit Rule 75 ..... *passim*

Sixth Circuit Rule 95 13

STATEMENT OF THE CASE

Petitioner Jane Doe alleges she was sexually molested by John Lomnicki, a teacher at Roseville Community Schools, when she was in kindergarten. On approximately five separate occasions, Petitioner Doe alleges she was removed from her kindergarten classroom by Mr. Lomnicki and taken to the boy's bathroom, his office or the school library. Petitioner Doe had no bruises or visual signs of abuse after the alleged incidents and made no reports to anyone for almost two years. Unfortunately, Petitioner Doe has also claimed to have been sexually abused by a young girl while spending the night at her aunt's house and on another occasion by her Godmother's niece. The young Petitioner's active imagination and proclivity to express herself and gain attention through claims of abuse has made the search for a consistent story difficult. Further complicating the task is the immediate family's rather extensive history of abuse; including Petitioner Doe's mother, aunt, and sisters having been involved in prior sexual abuse.

Petitioner Doe was unable to identify when the alleged acts occurred, but first reported these allegations to the school in November 1994. This was one and one-half years after the Warren Police had arrested Mr. Lomnicki, the school officials had removed him from any student contact, and numerous media stories concerning the criminal arrest had been aired or written.

In February 1993, the Warren Police were investigating the claims from ten years prior of Mr. Lomnicki's neighbor and came to Roseville Community Schools with a search warrant for his personnel file. Upon becoming aware of the seriousness of the charges (*i.e.*, reviewed police report),

Superintendent John Kment had Mr. Lomnicki removed from the classroom and from further contact with children. Officially, Mr. Lomnicki was reassigned to Central Office on March 2, 1993. The criminal investigation regarding Mr. Lomnicki received quite a bit of media attention, and the allegations against him were common knowledge in the community. After over one and one-half years, in November 1994, Petitioner Doe came forward for the first time with allegations of molestation. Mr. Kment responded to this new allegation by contacting the Roseville Police and the Michigan Department of Social Services. Mr. Lomnicki had already been removed from the classroom and any contact with students by the time Petitioner Doe first came forward with her allegations. It is undisputed Petitioner Doe never told any school official or anyone else about her alleged abuse until November 1994.

Petitioners filed suit against: Mr. Lomnicki; John Kment, the current Roseville Community Schools Superintendent; Frank Mayer, former Roseville Community Schools Superintendent 1973-1988; Betty Slinde, Principal at Fountain Elementary 1973-1986; Leroy Herron, Assistant Superintendent, 1979-1989; and Dorothea Sue Silavs, Director of Special Education 1992-1997.

Dorothea Sue Silavs, the Director of Special Education, filled out a Department of Social Services ("DSS") form on December 20, 1994, reporting Petitioner Doe's allegations. Petitioner Doe alleged that Ms. Silavs intentionally withheld Mr. Lomnicki's name on the DSS form. Ms. Silavs did not interview Mr. Lomnicki, Petitioner Doe or her mother. Instead, Ms. Silavs reported information that was relayed to her second-hand from a variety of sources. Regardless of the substance of the report, there is no dispute that Mr. Lomnicki

had long since been removed (over one and one-half years prior) from the classroom at the time of Ms. Silavs' DSS report, and thus, the accuracy of her report had no effect on Petitioner-Doe's claims herein.

Petitioner Doe also presented a 42 U.S.C. § 1983 claim against Frank Mayer, Leroy Herron, and Betty Slinde. None of these individuals had any direct contact with Petitioner Doe, nor did they have any information regarding her allegations. In fact, all were retired by the time Petitioner Doe enrolled in Roseville Community Schools. Each of these Respondents was sued for their prior reprimands of Mr. Lomnicki, fifteen, thirteen, and four years prior to Petitioner Doe being enrolled in the Roseville Community Schools.

Betty Slinde was the Principal at Fountain Elementary when in 1977, it was reported that Mr. Lomnicki inappropriately touched a female student. Ms. Slinde met with the student, her father, and Mr. Lomnicki. After reviewing the allegation and hearing both sides, she issued a verbal reprimand regarding "inappropriate touching." Ms. Slinde felt Mr. Lomnicki's actions were inappropriate, but did not find them to be sexually motivated. After speaking with Mr. Lomnicki, she was assured the incident was a misunderstanding and possibly misinterpreted by the student.

Dr. Frank Mayer, former Superintendent, issued a disciplinary reprimand on April 2, 1979, for Mr. Lomnicki's poor judgment in straightening a student's clothing. Dr. Mayer investigated the allegations and determined the act was not sexually motivated. Although he did not believe the allegation was sexually motivated, he issued a written reprimand, which was placed in Mr. Lomnicki's personnel file.

Leroy Herron, the Assistant Superintendent, issued a disciplinary reprimand on January 27, 1988, to Mr. Lomnicki. Dr. Herron was contacted by the principal at Arbor Elementary regarding a complaint some girls had about Mr. Lomnicki. When Dr. Herron spoke with the girls, they were laughing and giggling and reported very mild claims of hugging, holding hands, and other behavior which gave them the "creeps." Dr. Herron met with Mr. Lomnicki who denied any wrong doing. Although Dr. Herron did not feel that the "hugging" was sexually motivated, he issued a written reprimand which was placed in Mr. Lomnicki's personnel file.

On March 7, 2001, Respondents filed a timely Notice of Appeal of the District Court's denial of their motion for summary judgment based upon the qualified immunity defense. Petitioners responded by filing an emergency motion to dismiss on jurisdictional grounds, which was denied by the Sixth Circuit on June 12, 2001. Thereafter, the parties filed timely appeal briefs and provided oral argument on the issues before a panel of the Sixth Circuit. On July 16, 2002, the Court concluded that all of the individual Defendants were entitled to summary judgment based on the qualified immunity defense.

Petitioners filed a motion for rehearing *en banc*, which was denied on September 19, 2002. Petitioners have now filed this Petition for Writ of Certiorari challenging: (1) the jurisdiction of the Sixth Circuit; and (2) the granting of summary judgment to the individual Respondents based upon the qualified immunity defense.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit properly had jurisdiction to review the district court's denial of Respondents' motion for summary judgment based upon the qualified immunity defense.

In *Hoard v. Sizemore*, 198 F. 3d 205 (6th Cir. 1999), the Sixth Circuit discussed in great detail, appellate review of the qualified immunity defense. The court noted, "a district court's order denying summary disposition that is based on qualified immunity and turns on an issue of law is immediately appealable as a final judgment under the Collateral Order Doctrine." *Hoard*, at 211, citing *Mitchell v. Forsyth*, 472 U.S. 511, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). However, as this Court has previously explained,

> under the doctrine of *Johnson v. Jones*, 515 U.S. 304 (1995), this Court cannot review on interlocutory appeal a district court's determination that a genuine issue of fact exists for trial, **but we retain jurisdiction over the legal question of qualified immunity, *i.e.* whether a given set of facts violates clearly established law.**

Hoard, at 211.

In determining whether qualified immunity exists, the Court must determine first, "whether the plaintiff has asserted a violation of a constitutional right at all." *Hoard*, at 212, citing *Blair v. Meade*, 76 F. 3d 97, 100 (6th Cir. 1996). "Only after the court makes this determination does it consider whether this right was clearly established, the second question in the qualified immunity analysis." *Hoard*, at 212.

In *Behrens v. Pelletier*, 516 U.S. 299, 133 L. Ed. 2d 733, 166 S. Ct. 834 (1996), the Supreme Court stated: "denial of summary judgment often includes a determination that there are controverted issues of material fact, (*see* Federal Rules of Civil Procedure 56), and ***Johnson*** **surely does not mean that every such denial of summary judgment is non-appealable.**" *Behrens*, at 312-313 (emphasis in original). In *Behrens*, the Supreme Court reaffirmed its previous holding in *Johnson* that:

> [A]ppellate courts do not have jurisdiction to review 'the determinations of evidentiary sufficiency . . . if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred,' but instead only have jurisdiction over 'summary judgment determinations . . . that resolve a dispute concerning an abstract issue of law relating to qualified immunity . . . typically, the issue of **whether the federal right allegedly infringed was clearly established**. . . .'

Behrens, at 313.

The Court held in *Behrens*, as it did in *Johnson*, that:

> **[T]he legal issue contained in a district court's denial of summary judgment is not insulated from review simply because the district court states in a conclusory fashion that material issues of fact remain. . . . If a district court does not adequately explain its reasons for denying a motion for summary judgment on the basis**

> **of qualified immunity and instead has stated conclusory that there are material disputes of fact remaining, the Court of Appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed.**

Behrens, at 313, quoting *Johnson*, at 319.

> The purpose of that review of the factual record is to determine **whether the district court's holding that a given set of facts** *violates clearly established law is correct*, not to determine whether the district court properly concluded that an issue of fact is genuine, as the later determination is not reviewable.

Hoard, at 220 (emphasis added). "The distinction between the two, of course, is the difference between a legal question and a factual question." *Behrens*, at 220.

In the present case, it was appropriate for the Sixth Circuit Court of Appeals to review the trial court's denial of Respondents' motion for summary judgment. The trial court stated in a conclusory fashion that there were material questions of fact which precluded summary judgment. The trial court did not state why summary judgment was denied for each of the five individual Defendants claiming qualified immunity. The trial court did not state what each individual Defendant did to violate Petitioner Doe's constitutional rights. The Sixth Circuit properly determined that the district court did not identify the facts it assumed when it denied summary judgment. The Sixth

Circuit reviewed the district court's decision *de novo* to determine whether reviewing the facts as Petitioner Doe alleged established that the Respondents violated a clearly established right. Pursuant to *Johnson v. Jones*, when the district court does not identify the facts it relied upon in denying a motion for summary judgment based upon qualified immunity, the appellate court must undertake a cumbersome review of the records to determine what facts the district court, in the light most favorable to the non-moving party, likely assumed. *Johnson*, at 319. The Sixth Circuit was clear in its assertion of jurisdiction on these grounds as evidenced by the following:

> In the case before us, the district court did not identify the facts that it assumed when it denied summary judgment to each of the five defendants claiming qualified immunity. Rather, it denied summary judgment because there were "underlying factual disputes as to the qualified immunity." Accordingly, we may review *de novo* the district court's decision to determine whether viewing the facts as the plaintiff portrays them, the defendants are entitled to qualified immunity as a matter of law.

Pet. App. B, at 13a.

The Sixth Circuit properly determined it had jurisdiction to review the denial of Respondents' motion for summary judgment on qualified immunity grounds.

Petitioner Doe brought claims against three of the individual Defendants, Slinde, Mayer, and Herron, who were no longer employed by the Roseville Community Schools at the time Petitioner Doe was allegedly abused by

Mr. Lomnicki. These three Defendants had never met Petitioner Doe, and accordingly, could not have been said to have violated her constitutional rights. The Sixth Circuit properly determined that the three Defendants did not violate Petitioner Doe's constitutional rights.

I. Respondents Elizabeth Slinde, Leroy Herron, and Frank Mayer Did Not Violate Petitioner Doe's Constitutional Rights

Respondents Slinde, Herron, and Mayer were sued for their alleged actions or in actions in responding to prior complaints or allegations against Mr. Lomnicki. None of these Respondents were employed with Roseville Community Schools at the time of Petitioner Doe's allegations or at the time Mr. Lomnicki was removed from the classroom. Petitioner Doe's claim against these Respondents is based on the theory that they failed to terminate Mr. Lomnicki at the time of these prior complaints. The evidence available at the time of these Respondents' investigation did not support termination of Mr. Lomnicki nor a claim of "deliberate indifference." Rather, as concluded by the Sixth Circuit, the facts demonstrate that these Respondents conducted an investigation, spoke with the complainants and their parents, spoke with Mr. Lomnicki, and took appropriate action. The Sixth Circuit concluded that, "the facts did not support a claim of constitutional violation against the defendants." (Pet. App. B, at 16a).

A. Elizabeth Slinde

Elizabeth Slinde was employed for 33 years at Roseville Community Schools from 1953 to 1986. Ms. Slinde was involved in one incident where she investigated a reported claim of inappropriate touching involving John Lomnicki while she was the Principal at Fountain Elementary School. She recalled that the incident occurred in the mid-1970's. Ms. Slinde recalled that a girl reported that Mr. Lomnicki had put his hand down her pants while she was at school. Ms. Slinde spoke with the girl's father regarding the allegations. She requested that the father attend a meeting with Mr. Lomnicki to discuss the seriousness of these charges. The father indicated he did not want to attend the meeting and he wanted Ms. Slinde to talk to Mr. Lomnicki.

Ms. Slinde met with Mr. Lomnicki and discussed the inappropriateness of touching students. Mr. Lomnicki did not admit to any inappropriate touching and explained the physical contact as being justified (*i.e.*, tucking in a blouse). Ms. Slinde testified:

> [b]ecause after discussing it with — during the investigation, I felt that it wasn't necessary to go further. I just felt that there was perhaps a misunderstanding, you know, that there was just some — misunderstanding on the part of both Mr. Lomnicki and the child, that perhaps she misinterpreted his actions. I don't know if he was putting in her blouse or whatever, but I can't remember exactly what he had said.

While Ms. Slinde believed touching occurred, she did not think it was sexually motivated nor did it rise to sexual

harassment. Ms. Slinde gave Mr. Lomnicki a verbal reprimand and admonished him for his behavior.

B. Leroy Herron

In 1979, Dr. Herron became the Assistant Superintendent in charge of instruction and curriculum for Roseville Community Schools until he retired in 1989. On January 27, 1988, Dr. Herron issued a disciplinary reprimand to Mr. John Lomnicki. The reprimand states:

> In pursuance to the meeting held in my office on Monday, January 18, 1988, regarding your poor judgment with several 6th grade female students at Arbor Elementary School, I am placing this written disciplinary reprimand in your personnel file.
>
> The problem surfaced when several girls accused you of touching them and putting your arms around their shoulders. In our meeting, you explained how the situation occurred and you felt it was a lack of good judgment on your part. I find this type of behavior unacceptable for a classroom teacher. Therefore, I-am issuing you a written reprimand. The reprimand will be a reminder to you that you are not to hug or put your hand on students in a manner that could be misconstrued by them or their parents. I would suggest in the future you should not attempt to straighten out sweaters or blouses of your students. If there are any future accusations from students concerning your behavior, it could result in further disciplinary action.

> This memorandum will become a part of your permanent personnel record. It will be placed in a sealed envelope in your personnel file with a notation on the outside of the envelope that it is a disciplinary reprimand issued January 25, 1988.

Sixth Cir. R. 75, January 27, 1988, reprimand, Apx. Pg. 261.

Dr. Herron was contacted by Roberta Fanti, the Principal of Arbor Elementary. Ms. Fanti indicated that several girls had made an accusation against a teacher. Dr. Herron met with the three girls who had made an accusation of inappropriate behavior against John Lomnicki. Dr. Herron recalled,

> after talking with the girls okay and talking with Mr. Lomnicki, everything the girls told me, Mr. Lomnicki had a response to and just like any other teacher it was to be believed and I'm saying the girls in asking them questions it was nothing just concrete. They were giggling, some laughing. . . .

Sixth Cir. R. 75, Leroy Herron Tr. p. 186, Apx. Pg. 236.

Following his investigation, Dr. Herron made the decision to issue a written reprimand which was permanently placed in Mr. Lomnicki's personnel file. He did not feel the "hugging" of the girls was sexual harassment nor in any way sexually motivated. Viewing Dr. Herron's actions objectively, he was not deliberately indifferent to Petitioner Doe's constitutional rights. First, Dr. Herron investigated the allegations. Second, he spoke with Mr. Lomnicki who had an acceptable explanation for his actions. Third, the girls

were giggling and laughing when they were interviewed. Fourth, there was no suggestion that there was anything sexual about the touching. Finally, Dr. Herron issued a written reprimand which was a reasonable action under the facts known to him at the time of his investigation.

C. Frank Mayer

Dr. Frank Mayer was the Superintendent of Roseville Community Schools from 1973 until 1988. On April 2, 1979, Dr. Mayer issued a disciplinary reprimand to Mr. John Lomnicki which stated:

> As a result of my meeting with you, I am issuing this disciplinary reprimand to you because of the poor judgment you have displayed this year in your relationship with female students at Kaiser School. Please consider this admonishment as a reminder that you are not to straighten clothing or pick up jewelry from beneath a sweater or blouse or to touch students in a way which could be misinterpreted by them or their parents. Your instances of poor judgment on your part may result in more severe disciplinary action up to and including discharge.
>
> Please note that this memorandum will become a part of your permanent personnel record. In order to maintain confidentiality, this document will be placed in a sealed envelope and your personnel file with a notation on the outside of the envelope that it is a disciplinary reprimand issued this date.

Sixth Cir. R. 95, Defendants' Motion for Summary Judgment, April 2, 1979, reprimand, Apx. Pg. 491.

After reviewing the facts regarding the 1979 incident, Dr. Mayer made the decision that the allegations were not sexually motivated:

Q: You've testified that the claim being made in this 1979 incident did not have any merit in your opinion?

A: My opinion, yes.

Q: And what is it that makes you conclude that this has no merit?

A: If it would have had merit, I would have taken legal action with the help of the attorney and the support of the Board.

Q: What kind of legal action?

A: It would depend; probably leading to dismissal.

Q: Do you recall having any meetings with Mr. Lomnicki regarding these claims of inappropriate sexual touching?

A: Just the fact that we met, which was reinforced by the memo, but the details of it, no, I don't recall.

Sixth Cir. R. 75, Frank Mayer Tr. p. 71, Apx. Pg. 223.

Q: Okay. What is the basis of your memory that there was no merit?

A: If there would have been merit, I would have taken action, disciplinary, much more severe disciplinary action.

Q: Is there anything between the claims such as this having merit and being frivolous? I'm trying to understand what you mean when you say no merit.

A: The charges could not be substantiated or were not substantiated.

Q: That in fact Mr. Lomnicki had done the things described in your April 2, memo?

A: No, that — I didn't say that. I said there was no substantiation to the fact that he was — did anything deliberate that would be a sexual misconduct charge, that it was unintentional on his part.

Q: So you refer to that memo to poor judgment?

A: Yes.

Sixth Cir. R. 75, Frank Mayer Tr. pp. 88-89, Apx. Pg. 225.

Dr. Mayer was still the Superintendent when Dr. Herron handled the 1988 incident and disciplinary reprimand. Dr. Herron met with Mr. Lomnicki and prepared a two page memorandum summarizing his meeting with Mr. Lomnicki.

After a reprimand was placed in Mr. Lomnicki's file, he was transferred to another position. Mr. Lomnicki was transferred out of Arbor Elementary School to Eastland Elementary School. Dr. Mayer explained why Mr. Lomnicki was reprimanded on two previous occasions, even though the school officials did not believe him guilty of the allegations made by the students.

> A: In 1979 and 1988, neither case was proven, so are we going to take possibly rumors and trumped up charges and then penalize that teacher, when it could have been completely falsehood on the part of the students? We wouldn't do that. If we would have had proof it was a molestation, we would have acted accordingly, and he wouldn't be in the classroom.

Sixth Cir. R. 75, Frank Mayer Tr. p. 216, Apx. Pg. 231.

In dismissing the above three Respondents, the Sixth Circuit relied upon the case of *Doe v. Clairborne Co., Tenn.*, 103 F.3d 495 (6th Cir. 1996). As in *Clairborne*, the Sixth Circuit found that the facts, as presented by the instant Petitioner, did not demonstrate that these Respondents had information which "showed a strong likelihood that he [Lomnicki] would attempt to sexually abuse other students, such that the failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students." (Pet. App. B, at 19a). Noting the standard set forth in *Clairborne*, the Sixth Circuit stated:

> Nothing that these defendants did or did not do encouraged Lomnicki's abuse of Jane, constituted

> participation in that abuse, or authorized, approved or knowingly acquiesced in it.

Pet. App. B, at 19a.

II. Respondents Sue Silavs And John Kment Are Entitled To Qualified Immunity

Respondent Sue Silavs and John Kment are the only two Respondents who are being sued for how they responded to Petitioner Doe's allegations that John Lomnicki molested her. Petitioner Doe cannot establish that Respondents Silavs and Kment received notice of a pattern of unconstitutional acts, demonstrated deliberate indifference to the acts, failed to take sufficient remedial action or that such failure proximately caused the injury to the students. *Jane Doe A v. Special School District of St. Louis Co.*, 901 F. 2d 642 (8th Cir. 1990).

A. John Kment

John Kment became the Superintendent of Roseville Community Schools in August, 1988. Prior to his appointment as Superintendent, he was the Principal of Roseville High School. Prior to 1993, he did not know Mr. Lomnicki, nor was he aware of his reputation, negative or positive.

In late February 1993, Mr. Kment received a police report from the Warren Police Department indicating there was an active investigation of criminal sexual conduct allegations brought against John Lomnicki by his neighbor. The former neighbor, Sarah Williams, was not a student of Roseville Community Schools. However, Ms. Williams alleged John Lomnicki had molested her ten years prior in her home. Without any further information other than a brief phone call

between Warren Police and an assistant superintendent regarding the production of Mr. Lomnicki's personnel file, Mr. Kment had no reason to remove Mr. Lomnicki from his position until further information was received. Additional information in the form of a copy of the police report was first received close in time to the February 25, 1993, search warrant regarding Mr. Lomnicki's personnel file.

Upon reviewing the police report, Mr. Kment immediately assigned Mr. Lomnicki to Central Office and to have no further contact with students. Although official charges had not yet been brought and Mr. Lomnicki must be presumed innocent, Mr. Kment took immediate action. Mr. Lomnicki was removed from the classroom on March 2, 1993, only days after a copy of the police report was produced. Petitioner Doe has produced no evidence that any damage or inappropriate action occurred between herself and Mr. Lomnicki during this period.

Mr. Kment first became aware of Petitioner Doe's allegations of sexual harassment some 20 months later in November 1994. Mr. Culich, the Principal at Eastland Elementary, came to Mr. Kment's office and told him that a parent was in to see him concerning her daughter and that there was an allegation that Mr. Lomnicki had engaged in inappropriate sexual conduct. Mr. Kment responded by immediately reporting the incident to the police and the DSS. Mr. Lomnicki was already working in the School's administrative offices pursuant to Mr. Kment's prior removal of Mr. Lomnicki from the classroom following the investigation by the Warren Police Department. While Mr. Kment was engaged in gathering evidence to support a tenure removal, which would be placed before the school Board of Education, Mr. Lomnicki voluntarily retired.

Mr. Kment acted quickly and responsibly in removing Mr. Lomnicki from the classroom and prohibiting any further contact with students after the Warren Police informed him of a criminal sexual conduct investigation. It is undisputed that when Mr. Kment first learned of the allegations brought by Petitioners in this case, Mr. Lomnicki had already been removed from the classroom. Petitioner Doe concedes no prior notice of her abuse was known to Mr. Kment or any other school official. Her only claim is that Mr. Kment should have removed Mr. Lomnicki earlier in January or February of 1993, based solely on a police officer's informal request to review Mr. Lomnicki's personnel file.

B. Dorothea Sue Silavs

Ms. Silavs was the Director of Special Education for Roseville Community Schools from July 1992 until August 1997. On December 20, 1994, Ms. Silavs filled out a DSS form regarding suspected abuse or neglect. Ms. Silavs reported:

> A student has recently alleged that a reading teacher abused her two years ago, but circumstances are unlikely and child is inconsistent. Investigation reveals child was evaluated and certified emotionally impaired 5/94 and evaluation revealed reports of "Chuck Norris hurts me when he touches my private parts". Concerned that child being abused by whom? Someone at home?

Sixth Cir. R. 75, Department Social Services Report Form, Apx. Pg. 359.

Ms. Silavs filled out this form in order to comply with the DSS requirements[1]. Respondents' claims against Ms. Silavs are premised on a theory that she intentionally attempted to hide or protect John Lomnicki. However, Ms. Silavs' report was two years after the last contact between Petitioner Doe and Mr. Lomnicki. John Lomnicki had been removed from any contact with students 20 months earlier. Nothing Ms. Silavs did or did not do had any impact on Petitioner Doe or her constitutional rights. The DSS was notified, as were the police, and criminal charges were immediately brought against Mr. Lomnicki. Since Ms. Silavs' involvement merely consisted of filling out the DSS form after Mr. Lomnicki was removed from the class room, she should be entitled to qualified immunity.

The Sixth Circuit found no basis for concluding the either Respondents Kment or Silavs violated Petitioner Doe's constitutional right to be free from sexual abuse. Petitioner Doe presented no evidence which established or "demonstrated any causal connection between any action or inaction of Kment and any injury to Jane, and therefore do not allege a violation of any constitutional right." (Pet. App. B, at 21a). There is simply no evidence that Petitioner Doe was injured or that her constitutional rights were violated during the brief period of time that Dr. Kment was aware of the inappropriate sexual conduct allegations of a non-student and the time he removed Mr. Lomnicki from the classroom setting. Equally lacking was any evidence that Respondent Silavs' report to the DSS amounts to a violation of Petitioner Doe's constitutional rights, when said report was made close to two years after the fact, regardless of whether the report was erroneously or even falsely made. (*Id.*).

1. Unbeknownst to Ms. Silavs, Mr. Kment had previously reported Petitioner Doe's allegations. Mr. Kment's report was approximately one month prior to November, 1994.

In *Jane Doe A, supra*, plaintiffs filed a § 1983 cause of action against the school district, superintendent, director of transportation, and others for allegations of sexual abuse committed by the school's bus driver. The bus driver was arrested for sexual abuse and later pled guilty to cases involving five children. *Jane Doe A*, at 643. The district court granted summary judgment in favor of all of the defendants. On appeal, the Eighth Circuit reviewed the evidence plaintiffs presented in support of their claims.

Defendant Dr. Scarnato, the District's superintendent, received a single complaint from a parent that on one occasion Cerny [bus driver] had cursed at her and called her names in front of the children on the bus. Dr. Scarnato may also have received information from a District employee that **Cerny had kissed a child on the bus.**

> Defendant Campbell, director of transportation, was told by defendant Marchlewski, that **Cerny has kissed a boy** . . .
>
> Defendant Marchlewski, supervisor of the north bus garage, and defendant Hill, supervisor of bus aides at the north garage, received complaints that Cerny used profanity on the bus, **had kissed a boy on the bus**, and had pushed on of the plaintiffs down the bus steps and pulled his hair. Ms. Marchlewski also received complaints that . . . **kissed and kicked a child and had given him a "snuggle"**. . .

> Defendant Stotlar, area coordinator for the District received many of the same complaints received by the other individual defendants. In addition, in October of 1984 she allegedly received a complaint from a parent that **Cerny had put his hand down a boy's pants and pulled down a boy's pants and spanked him**. Shortly before Cerny's arrest in February 1985, one of the plaintiffs told Ms. Stotlar that **Cerny had been touching boy's crotches**.

Jane Doe A, at 644.

The Eighth Circuit affirmed the granting of summary judgment in favor of the defendants:

> As to the individual defendants, we agree that the evidence, viewed in a light most favorable to plaintiffs, would not support a finding that the individual defendants had notice of a pattern of unconstitutional acts by Cerny or that they were deliberately indifferent to or tacitly authorized Cerny's alleged physical and sexual abuse of plaintiffs. Likewise, we agree with the district court that defendant Stotlar at most was guilty of negligence in failing to respond to the October 1984 complaint regarding Cerny's alleged misconduct. As the district court noted, such negligence does not implicate fourteenth amendment protections.

Jane Doe A, at 646.

In the present case, the evidence shows that the Respondents responded to complaints regarding John Lomnicki and issued disciplinary reprimands. The actions taken by the Respondents were appropriate given the facts and allegations known at the time. As the Eighth Circuit recognized:

> To hold that the individual defendants and the District are not liable to plaintiffs is not to minimize Cerny's misconduct. That subsequent events proved him to be a sexual reprobate, however, should not result in after the fact imposition of the requirement of character-discerning omniscience on the part of the individual defendants or the District. Viewed in retrospect, some of Cerny's pre-arrest conduct portrays his true nature with a clarity that pre-arrest circumstances at the most only hinted at. If negligence could form the basis for a finding of liability, plaintiffs' showing may have been adequate to take the case to a jury. Measured against the deliberate indifference-official policy standard of liability, however, plaintiffs have failed to establish a submissible case.

Jane Doe A, at 646-647.

The Petition for Writ of Certiorari should be denied. The Sixth Circuit had proper jurisdiction to review the denial of Respondents' motion for summary judgment based on qualified immunity. Furthermore, the evidence taken in the light most favorable to the Petitioners demonstrates that Respondents did not violate any clearly established constitutional right of Petitioner Doe.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Honorable Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

TIMOTHY J. MULLINS
DANIEL J. KELLY*
TIMOTHY R. NOONAN
COX, HODGMAN & GIARMARCO, P.C.
Attorneys for Respondents
101 West Big Beaver Road
Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

* *Counsel of Record*